

to make a conditional order requiring the petitioner to remove any encroachment on a public street within a fixed time. If the petitioner objects to do so, he has to appear before the Panchayat at a time and place to be fixed by that order and have it set aside or modified. It is only if the petitioner does not perform such an act or appear to show cause that the conditional order will be made absolute. If, however, he appears and shows cause against the order, then the Gram Panchayat will take evidence and if it is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in that case. If, on the other hand, it is not so satisfied, the order shall be made final. The Gram Panchayat, therefore, had to take evidence produced by the objector before it could make its conditional order absolute. Action under section 23 of the Act will be taken only if a person disobeys an order of the Gram Panchayat made under section 21. In the instant case, these provisions were not followed by the Gram Panchayat before it passed the resolution against the petitioner.

(8) In view of what I have said above, I accept this petition, quash the order, dated 17th April, 1968, and 30th September, 1966, made by the Director of Panchayats and the Sub-Divisional Officer (Civil) respectively and also the resolution, dated 5th May, 1966, passed by the Gram Panchayat. The Panchayat can, if it is so advised, proceed afresh against the petitioner, in accordance with the provisions of sections 21 and 23 of the Act. In the circumstances of this case, I will make no order as to costs.

N. K. S.

REVISIONAL CIVIL

Before Harbans Singh, Chief Justice.

SHRI TEJA SINGH, ETC.—*Petitioners*

versus

GURDIAL SINGH, ETC.—*Respondents.*

Civil Revision No. 403 of 1969

September 25, 1970.

Code of Civil Procedure (V of 1908)—Order 23 rule 1—Application for withdrawal of suit—Such suit—Whether automatically stands withdrawn—Order by the Court allowing the withdrawal—Whether necessary—Plaintiff applying for withdrawal—Whether can withdraw the application before the Court passes any order thereon.

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Shri Teja Singh, etc. v. Gurdial Singh, etc. (Harbans Singh, C.J.)

Held, that on an application under Order 23 rule (1) of Code of Civil Procedure for withdrawal of a suit having been made by the plaintiff, the Court has to apply its mind to the same and, if there are certain circumstances, it may refuse to permit the plaintiff to withdraw from the suit. In any case, as provided by sub-rule (3), rule 1, of the Code the Court has to apply its mind whether the costs may be awarded against the plaintiff and if so, to what extent. The suit does not automatically stand withdrawn as soon as the plaintiff files an application for withdrawal. An order has to be passed by the Court to make the withdrawal effective. There is nothing in the Code or otherwise on general principles, which prevents a person who has filed an application for withdrawal of the suit to withdraw the same before the Court has passed any order thereon, particularly when there is no allegation that such an application had meanwhile adversely affected the interest of any party or any person has changed his position for the worse relying on that application for withdrawal of the suit. (Para 4).

Petition under section 44 of Act IX of 1919 and section 115, Civil Procedure Code, for revision of the order of Shri Udham Singh, District Judge, Patiala, dated the 19th day of March, 1969, affirming that of Shri Amjad Ali Khan, Sub-Judge 1st Class, Nabha, dated the 27th day of July, 1968, allowing the plaintiffs' application dated 16th day of July, 1968 to withdraw their earlier applications for the withdrawal of their suit.

B. S. JAWANDA, ADVOCATE, for the petitioners.

MRS. BINDRA, ADVOCATE, for the respondents.

JUDGMENT

HARBANS SINGH, C.J.—(1) This revision has arisen in the following circumstances: A suit was filed by two brothers, Gurdial Singh and Gurnam Singh, against Teja Singh and others for the possession of houses, etc., situated in village Tohra, in tehsil Nabha. This suit was filed on 3rd of May, 1967. Some evidence had been recorded when on 2nd of July, 1968, Gurdial Singh, one of the plaintiffs, filed an application to the effect that he did not want to proceed with the case and wanted to withdraw the same. The other plaintiff not being present, the case was adjourned to the next day, i.e., 3rd of July, when the other plaintiff also presented a similar application. In the proceedings recorded by the learned Subordinate Judge on 2nd of July, 1968, it is mentioned—

“It is stated that parties have entered into compromise. For recording the statements of the plaintiffs, the case to come up on 3rd July, 1968.”

On 3rd of July, 1968, the order recorded is—

“Gurdial Singh, plaintiff is not present today. His counsel states that he could not come today due to urgent work and requests for an adjournment. To come up on 16th July, 1968.”

One thing is clear that the case was adjourned to 16th of July, 1968, without recording any order on the two applications submitted by Gurdial Singh, on the 2nd of July and by Gurnam Singh on the 3rd of July. On the 16th of July, however, both the brothers filed an application to the effect that their earlier applications were got filed on some misrepresentation and fraud and on that date the following order was passed:—

“Two applications have been moved, one by the plaintiffs and another by one Gurdev Singh. Notice thereof given to the other party. To come up for reply on 19th July, 1968.”

(2) The objection raised on behalf of the defendants was that the plaintiffs should not be allowed to withdraw their earlier applications for the withdrawal of the suit. The lower Court after considering the matter allowed the earlier applications to be withdrawn and this order was confirmed by the District Judge relying upon *Yeshwant Goverdhan v. Totaram Avasu and others* (1), and *Jagarnath Keyal v. Nagal Mull* (2). The defendants have filed this revision.

Sub-rule (1) of rule 1 of Order XXIII, Civil Procedure Code, is in the following terms:—

“At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.”

Sub-rule (2) of rule 1 deals with an application for withdrawal of the suit with permission to bring another suit on the same cause of action.

Sub-rule (3) of the said rule is as follows:—

“Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.”

(3) The contention on behalf of the defendants before me is that no permission is required for withdrawal from the suit and sub-rule

(1) A.I.R. 1958 Bom. 28.

(2) A.I.R. 1962 Pat. 426.

(1) gives unqualified power to the plaintiff to withdraw from the suit or abandon part of his claim. It is, therefore, argued that once an application is made by a plaintiff, or by all the plaintiffs where there are more than one, for withdrawal of the suit, the suit stands withdrawn as no permission of the Court is required. The view taken by the Bombay High Court in *Yashwant Goverdhan's case* (1) was that some order had to be passed by the Court. No doubt if a plaintiff wants to withdraw his suit, there would be no reason to refuse such an application, but as provided under sub-rule (3), mentioned above, the Court has to make an order with regard to costs and consequently so long as no order is passed by the Court on such application, there is nothing in law prohibiting the plaintiff from withdrawing such an application. Reliance was placed on a ruling of the Calcutta High Court in *Midnapore Zemindary Co. Ltd., v. Raja Bijoy Singh Dudhuria and others* (3). That was no doubt a case where the application was made under sub-rule (2), rule 1 of Order XXIII. In that application the prayer for mesne profits was sought to be withdrawn with permission to bring a fresh suit. That application was kept pending and the entire suit was dismissed. Ultimately the matter went to the High Court, where the plaintiff withdrew this application. In the last but one paragraph it was observed as under:—

“We cannot take away the right of a party to withdraw any application made by him on which no orders had been made at the time. The prayer for mesne profits accordingly stands and the technical defect has now been removed.”

(4) The only case taking a contrary view is *Smt. Raisa Sultana Begam and others v. Abdul Qadir and others* (4). Reference in this respect may also be made to certain observations of the Supreme Court in *M/s Hulas Rai Baij Nath v. Firm K. B. Bass and Co.* (5). In that case the plaintiff in a suit for rendition of accounts, put in an application for withdrawal of the suit at a stage prior to the passing of a preliminary decree, but after considerable evidence had been led. The opposite party objected to the suit being allowed to be withdrawn on the ground that in a partition case decree can be passed in favour of the defendant on payment of court-fee. Dealing with this matter their Lordships observed as follows:—

“The language of Order 23, rule 1, sub-rule (1), gives an unqualified right to a plaintiff to withdraw from a suit and,

(3) A.I.R. 1941 Cal. 1.

(4) A.I.R. 1966 All. 318.

(5) A.I.R. 1968 S.C. 111.

if no permission to file a fresh suit is sought under sub-rule (2) of that rule, the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of that subject-matter under sub-rule (3) of that rule. There is no provision in the Code of Civil Procedure which requires the Court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it. It is of course, possible that different considerations may arise where a set-off may have been claimed under Order 8, or a counter-claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit."

These observations were no doubt made in relation to a suit for rendition of accounts, but these do indicate one thing clearly that on an application for withdrawal having been made by the plaintiff, the Court has to apply its mind to the same and, if there are certain circumstances, it may refuse to permit the plaintiff to withdraw from the suit. In any case, as provided by sub-rule (3), rule 1, the Court has to apply its mind whether the costs may be awarded against the plaintiff and if so, to what extent. It is, therefore, not correct to say that as soon as the plaintiff files an application for withdrawal of the suit, automatically the suit stands withdrawn. If that is not the case, and an order has to be passed by the Court to make the withdrawal effective, then there is nothing in the Civil Procedure Code or otherwise on general principles, which would prevent a person, who has filed an application, to withdraw the same, more so, if there is no allegation that such an application had meanwhile adversely affected the interest of any party or any person has changed his position for the worse relying on that application for withdrawal of the suit. That being the case, I feel that the Courts below were right in holding that the plaintiffs were entitled to withdraw their applications.

(5) For the reasons given above, I find no force in this revision and dismiss the same. The records of the case had been summoned in this Court. The same will be returned to the Court below immediately. The parties are directed to appear before the trial Court on the 26th of October, 1970, to take further date. There will be no order as to costs.

N.K.S.